

Book Review

SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY. By Iredell Jenkins.* Princeton: Princeton University Press. 1980. Pp. xiv, 390. \$25.00 (hardcover), \$9.95 (paperback).

Reviewed by
EARL FINBAR MURPHY**

I.

Iredell Jenkins, professor of philosophy emeritus at the University of Alabama, has written "an exercise in natural law" in which he offers a theory of positive law, describes the nonlaw processes from which law emerges, and examines what effectiveness law can possibly have even in a society congenial to its development. The work itself developed over a generation of his thought. This length of effort presents both a strength and a weakness. The strength is in the thoughtfulness, the ripe wisdom, the rich metaphor; the weakness lies in a sense of accidie that long reflection on a closely examined subject sometimes produces. What we have here, withal, is a beautiful and insightful contemplation of some of the more significant difficulties facing modern societies today.

Society can exist, of course, without law. Command, *caadi*-justice, conciliation, the cake of custom are each ways of social coping that avoid legal process. But the urban-industrial society, the market economy whether private or state capitalist, and the democratic pluralist polity flourish when there is a legal apparatus offering regular means of public access to impartiality, generality, and certainty for the management of both private and public affairs.

The themes addressed are at least as old as the days when Gorgias brought sophistry from Sicily to Athens. What is law and whence came it? What does law do and how well does law do it? But modern America is both cultures and millennia away from the Agora of the fifth century B.C. And while this book is about natural law, it is concerned with law in the late twentieth century A.D. in the United States, a place where the responsibilities of law have been hugely expanded even as the law's ability to discharge these new obligations steadily continues to erode.

*Professor Emeritus, Philosophy Department, University of Alabama. B.A. 1933, M.A. 1934, Ph.D. 1937, University of Virginia.

**C. William O'Neill Professor of Law and Judicial Administration, The Ohio State University College of Law.

It is not, therefore, a book that is either comparative or historical in character. It is not a review of the literature on any of the subjects which are addressed, hence the title of "essay." The internal housekeeping rules of the law, as well as recipes for improving the social order, are lacking. The emphases are upon the contemporary American legal scene and upon the law's enduring problems, conditions of success, social derivation, and environment within which legal process must act.

The old American vice, as ancient as the paradisiacal hopes of the Puritans at Massachusetts Bay, is perhaps the subterranean problem throughout the book: the attribution of both omniscience and omnipotence to law. Consistently throughout American history, there have been a misburdening and misunderstanding of law. Because Americans have been devoted to the rule of law and because so many good results have conferred benefits upon Americans as the consequence of that devotion, there have been repeated leaps in faith that law can perform any assigned task well. The old "legislating morality" ploy has been the way to solve all problems both quickly and easily, no matter how often failure has even more quickly and surely followed. The difficulty is that American culture may have reached the ultimate state in such abuse of law. And what happens, should that be true?

But this American vice and its inherent frustrations are more implicit than explicit in the book. Iredell Jenkins is involved in stating in quite abstract terms what law is, what law does, and what law cannot do rather than in wrestling with the social history of the American republic and the secular religion of that republic. His efforts are those of the philosopher, not the historian. Thus, while facts are listed, they are the facts supportive of natural law and not the ephemera of the historian.

II.

Iredell Jenkins opens his work with an Aristotelian view of law, seeing a single connectedness applying universally in nature. Man is but a part of nature, and in nature all human institutions function, including law. Nature is a continuity, and every effort at radical change is defeated ultimately by the homeostasis basic to nature. Humanity exists within nature because of their ability to adapt, with law one of the valuable cultural tools for accomplishing this adaptation. Law, therefore, has to be coterminous with order, a primitive term scarcely thought capable of definition or analysis. For Jenkins, it is the law's relation to disorder, its offering of an authoritative verbalization that turns chaos into structure, so that predictability is something other than a random chance.

Law may be a purely human phenomenon, but it is the surrogate for functions in nature that produce homeostatic order there. Law cannot be unconcerned with order or be a trifling, cruel, or arbitrary fiat and remain law. In essence, it is law's purpose to prescribe the pattern of order in society. Consequently, even when law is at its most formal, it is a natural event, an instrument through which man defines himself in nature. Disorder is a chal-

lenge to man and to his institutions, a challenge out of which law finds processes to expand the opportunities for human potential. Law need not always be consensual or beneficent. Much that is hierarchical and harsh can be a part of law. But any purported legal system without concern for finding some order in disorder has falsely named itself "law," for here is a real identity of name and existence.

Mystery is no part of law because law is concerned with the most practical of affairs. Mystery may be draped about law, but law is part of the crassest reality. Through law, the individual and the community allocate roles and powers, each so often misnamed as "right" that in many Indo-European languages "right" is *the* word for "law." As the Chinese legalists proved by their disastrous actions, the law cannot isolate individuals, or the community, or the state, or human relationships one from the other.

And, at this point, Iredell Jenkins moves into a sort of Plotinian terminology. In this language he indicates that he shall use the term *Many* to mean the plurality of all distinct entities; the term *One* to mean the wholes of which these entities are parts; the term *Process* to be the flux in which these entities are caught; and the term *Pattern* to include the consistencies that appear in this flux. Legal philosophers of every kind are to him like Narcissus at the pool, contemplating his extravagant beauty, the anorexic among the gods: Narcissus sees his features, but every movement of light, the ripple of the water, the shadows, fleeting shapes, change that face to a different, highly particular, symmetry and structure—only to be swept away again by another, even contrary, image. With all this the law must deal. No school of legal philosophy can escape the reflective position.

Still, however much law is located within nature, law cannot be equated with life—however much some of the American judicial activists may be implicitly asserting to the contrary. The law cannot reach a good many of the most important affairs of humanity, as even Hobbes acknowledged with his acceptance of a private sector within Leviathan. But law draws its sustenance out of a large *matrix*, a term long favored by Jenkins. Out of becoming comes being, out of being flows becoming, whether one cites Heraclitus, Hegel, or Sartre. Or, to phrase it differently, necessity gives way to possibility, disorder to order, synthesis to antithesis—all the ways of describing the back and forth movements that mobilize action in human institutions such as law. Because law comes out of a complex of physical and cultural conditions and values—Jenkins' *matrix*—the tendency is to identify law with what is both its source and the substance with which legal process must deal. But that identification is a mistake fatal in its consequences, depriving human society of an effective means of internalizing the force of externally compelled power in an impersonal authority.

The law functions at a complex interface of tensions, providing a deceptively smooth surface upon which society can erect structures for market, arena, forum, or such other institutions as society chooses. But the tensions are constantly pulling the atoms apart, pitting freedom against license, stabil-

ity against rigidity, social control against totalitarian repression. No one can predicate a legal system of wild disarray; but a chill comes over the crowd when a troop of armed men surrounds them and an officer barks, "We shall have order here!" At that point the smooth surface provided by law is broken, and crowd, troopers, and officer tumble into the pit of nonlaw.

Of course, in order to build this surface at such a point of interfacing tensions, the law must act formally and decree an artificial morality of antecedent and consequence. Men, asserts Jenkins, are held accountable for their actions by law. Religion may command a man to think no lustful thoughts, may threaten eternal damnation as much for conceiving as for attempting or effectuating the violation of another; but the law is satisfied if thought does not lead to action and in holding a man accountable only for his acts and not his secret ideas. Only when the law seeks to insinuate itself into those recesses does Jenkins see law exceed its function and threaten to break up the interconnection of tensions maintained to that point.

The law may balance liberty with equality. But in viewing this balance, one ought not discount the enigmatic term fraternity, that fellowship nurturing the potential within each human being. Today's affirmative action programs provide the modern definition. The state must have power to help both equality and liberty, but not too much power to help either. In the quibbles and quiddities of the law, fraternity finds the glue for holding together the brittle surface of interfacing tensions provided by law.

The law may be only an adjective; but, after all, it is the modifiers in a sentence that refine and direct its meaning. Continuously the meaning of the law is being fashioned, but law must always remain a principle of order, or it is not law at all. The order may be one of rightful inequality, as in feudalism. Or the order may be one of rightful equality, as has been true since the French Revolution introduced the world to equality, liberty, and fraternity—Pandora reincarnate in Marianne.

But in fashioning the law, Jenkins informs us, the fashioner should lift any personal vision above the allegedly "compelling interests of the here and now." Otherwise, alleged compulsions become the interests that will determine entitlements and dictate "rights." When this focus on the "here-and-now" prevails, then the risk increases that too much will be lightly undertaken, the surface will rupture, and no law will be left for anyone at all.

III.

Inevitably people will read this book only to say, "How can he say 'law' does anything? Is he personifying as though naming a nymph Dikê?" Others will ask, "How can he use words such as 'law,' or 'order,' or whatever? Doesn't he know the Vienna Circle ruled those out of philosophical consideration decades ago?" The answer is that Iredell Jenkins' ideas flow in an ancient tradition, a mighty stream on which they serenely float past every pundit's Vienna, as well as the moored rafts of American legal realism and the driven piers of Marxism.

From the pre-Socratics by way of Plato and Aristotle, on to the Stoics and the Roman jurists, then to Aquinas, Grotius and Locke, and so, by a few more stages, Jenkins moves to the present. The belief in the continuity of all law—of the law of nature, or morals, or custom, as well as human positive law—is shared by all of these philosophers. Jenkins adheres to this view and rejects positivism, legal realism, analytical jurisprudence, Austin, Kelsen, Dworkin, or whoever thinks differently. (On only the neo-Kantianism of John Rawls is he substantially silent.) And the result is that the rejections of Jenkins' ideas by people who would thus frame their questions are met by Jenkins' prior rejection of their positions.

For Jenkins, all schools of jurisprudence are prescriptive, being contingent upon the actual. There ought to be a frank recognition among all these schools that the similarity between what are called different laws, as each relates to its phenomenal field, is stronger than any dissimilarity, and that every kind of law, once defined, must have expository, normative, and prescriptive dimensions. This position makes Jenkins an exponent of natural law. He employs such scientific concepts as evolution and adaptation, but he is, fairly, a traditionalist. And as a traditionalist, he must reject such views as the power-centered jurisprudence of O. W. Holmes, Jr., the Pure Theory of Law, or any other school that Jenkins perceives as denying or constricting the traditional scope of natural law. All of these are for him ultimately, some sooner than others, destructive of law's support for society's other, nonlaw purposes.

Iredell Jenkins takes so traditional an approach that often he harks back to views long since without adherents. How long has it been since the common view was to reject the "discovery" of law and to insist upon its "invention"? But man lives his law long before he expresses it. Once law is stated, the expression comes from the discovery of what has been experienced. No "heaven of concepts" is Jenkins' source for the discovery of law. On the other hand, he sees only the most trivial of formal laws being capable of "invention." The basic legal process will come from the order integral in nature and from the formation each culture gives to the experience that is the direct matrix of law. For him, any other view only fragments the nexus between nature, the matrix, and legal process.

As Jenkins views anthropology, the hominids who first emerged had not differentiated law from other human institutions. At that time the expository, normative, and prescriptive dimensions of social action were themselves not segregated. But then mankind began to be formed and to acquire consciousness of a distinction of the general surround of nature. First, the need for nutrition on a regular basis prompted a sense of self-conscious existence; and then the development of the relationships we call economic furthered that course. After that came the rise of technology, *homo faber*, with law being one of the tools that were discovered in the emerging human experience. The human power of potentiation, of the endless becoming out of being so dear to philosophers such as Heidegger and Husserl, carried along this opening from nature into the present state of man-made, artificial environments.

Change in nature has been a plastic process and not one, in Jenkins' view, that need represent a divine grand design. So slowly has it occurred that humanity sees nature as static and only man's actions as dynamic. But this is false. Natural change is constantly present. Man's apparent dynamism is merely the state of consciousness that allows a framing of the institutions arising from the application of that consciousness to nature.

Animals live laws, but man articulates them. Man "makes" the law in the books, but these are mere verbal redactions of the law-in-action that he has already experienced. The result is that written positive law, when rising to its highest level of function, can do no more than provide a controlled passage from the actual order of experience to a future order that is being sought therein. The "making" and the "enforcing" of the positive law are, for Jenkins, the operating product of what has been sought and discovered.

There is in Jenkins' work a strong aesthetic at play that may have more control over his ideas than would be required from his ideas' substantive content. He delights in the triadic structure. Almost every subpart of his argument falls into three parts; almost every illustration by metaphor will come in three separate examples. Thus his three regimes of Necessity, Possibility, and Purposiveness join with other triads in his thinking. Is it the image of the orthodox Christian Trinity that controls his expression? Is it the magic property of the number three in Celtic and Teutonic mythology? Is it drawn from the Hegelian dialectic? Is it the sense of proportion and balance of the triad—the firm triangle of Pythagoras—that Jenkins calls to his assistance? No reader can say. Yet the persistence of triadic argumentation throughout the book cannot escape attention from anyone caught by the structure of the author's rhetoric.

But consider this one triad of Necessity, Possibility, and Purposiveness. Necessity is what must persist in all legal systems and, for Jenkins, arises from the same source as Sartre's view that man is "thrown" into the world. Possibility is the future directedness of the law, the human preoccupation with anticipation and intention that is unknown to other creatures or elements in nature. And Purposiveness is the condition of determinacy, the pull to which society cannot avoid responding, however much room may remain for individual choice or social indecision. Jenkins maintains that in every school of jurisprudence that denies the existence of a natural law, that natural law must maintain an underground existence because denial of such an existence does not make it so. Positive law finds its prototype in behavior because of the unavoidability of Necessity, Possibility, and Purposiveness in its formulation.

IV.

Behavior, however, tends to be conservative in Jenkins' view. Particularly, that behavior connected with custom and morality is conservative. Behavior alone does not provide the cachet for change. Law serves this latter function through its authoritative power to legitimize new conduct. This is the

dynamic in law that opens the gates to society's salvation from the doom of either fossilization or sterile conflict.

But because of this role of law, the twentieth century has repeatedly witnessed revolutions on behalf of class, race, and religion against this very role. This resistance has denied, and continues to deny, that the established or asserted behavior is to be permitted a legitimized change; or that the drift of society can be lawfully redirected; or that law is to be allowed to move predictably or with certainty. Race, class, or religious justice, their advocates insist, must prevail over law. For these prohibitive purposes, millions have died and millions more will die. And still—short of human extinction on behalf of these aims—the determined drift of society shall continue both for change and for legitimizing change through law, according to Jenkins.

The law is both servant and master. In practical terms, what the law legitimates must represent for society an act of social supremacy. Although what *is* tends to be seen as what *must* be and what *ought* to be, the law provides an organized means of shifting goals between the now (that flashing arrow in time) and the future (the never attained terminus). But what the law does *not* constitute in this function is the re-creation of the primitive homogeneous group of the early hominids, the intimate condition of solidarity that needed no law, which seems to brood in folk myth and periodically to be expressed in the General Will of Rousseau, the *Volksgeist* of von Seigny, perhaps even in the lexigraphically conditioned Social Contract of Rawls. Iredell Jenkins rejects a Golden Mean of perfect stasis in favor of the propulsion for change that law can direct but that nothing except human extinction can halt: Man cannot go home again either to the cave or to some simulacrum of it.

The law, though, has its own fatal beguilement. Because on occasion it is such a clever master, the obeisance is made to its sovereignty in all situations as if it were omniscient. More cultures err in denying the effectiveness of law than in its exaltation. Still, frenzy in support of the one is as harmful to society as frenzy on behalf of the other. Law cannot act under the factual condition of its denial, nor where there is no tolerance for its manipulations. Jenkins turns around Plato's position, "Being is Power," asserting that "Power is Being." By so doing, Jenkins claims that the effectiveness of the law is not something measured by instrumental efficiency. Rather it is the law's power to secure the values desired by the society within which the legal process functions that gives the law its being. There are limits, nevertheless, upon law's power. When the law fails major assignments because of a power failure, society turns to violence and pure command for producing the changes demanded.

V.

The great advantage held by the law in any process for social change lies in the platform law's advocates have for persuasion. Because a means of

legitimization commands initial attention in all cultures, the law has a chance for gaining credibility. What handicaps this chance in much of the world today lies in the importation of foreign law to cultures with a different tradition. Jenkins makes strong arguments for the power of indigenously developed law. But what of the strength of an exotic legal culture? Should it be rejected? For example, is Islamic jurisprudence enough for the modern Islamic state? If so, why have non-Islamic codes held such fascination for Islamic jurisdictions since Napoleon disturbed the East? The drawing power of traditional Islamic law is strong, but so is that of the exotic codes borrowed from western Europe. And what happens when opposing legal processes are juxtaposed each to the other?

As to these questions, I find the least help from Iredell Jenkins. He speaks here of necessary sacrifices by society, of the requirement for integrity in the decisions needed for reform. He encourages every member of society to stay as close as possible to the established social order, to try to persuade the contemporary generation of the credibility of the changes proposed to give change a domicile. But then he makes a plea for which little in the book prepared this reader: a plea for the importance of leaders whose integrity and ability will command public support for reform. Of course, all impersonal jural acts must have a human guise in the form of the actors and the acted upon, but in a book of themes such as these, the evocation of the principle of leadership is as troubling as if Tolstoy in *War and Peace* had concluded that Napoleon really had determined the course of battle through his imperious egoism alone.

Leadership seems not to be a theme with which Iredell Jenkins is comfortable. True, in contrasting intrinsic and extrinsic values, an indirect reference to leadership is made. He puts great emphasis on the importance of the followers' subjective preference for the leader as well as on the restraints necessarily imposed upon this Little Emperor in making his choices as leader. And in reaching the mediation that law negotiates between these two kinds of values, it is necessary for men to persuade and for men to be persuaded, just as it is human beings who sacrifice.

But the individuals are so numerous, so faceless when law effectuates a sweeping change, that it is as if abstractions were working upon abstractions to the point where it is hard to identify who is leader and who is lead. For this reason, the judgment-maker will be most closely followed when the order is one for quantitative change—more nurses on the ward, more guards on the cellblock—than when the order is for a qualitative improvement—more caring nurses to replace uncaring ones, more compassionate guards to replace uncompassionate ones. And how much role in the legal process is left for the subjective qualities of leadership?

Increasingly the twentieth century has opted for bureaucratically provable quantities, however irrelevant to the accomplishment of socially approved values, in lieu of persons with socially approved qualities. Demand a diploma: don't expect it to be proof of any knowledge. Require certification: don't

expect it to mean evidence of competency. Set teacher-student ratios: don't cavil if a box of rocks would be as effective as some teachers, regardless of their individual ratio to students. But, then, once the system is shoved over to judging all matters "reasonably" rather than quantitatively, what individual conduct cannot be shown as "reasonable," given the conditions as "reasonably" defined by the one who is subject to the test of "reasonability"? Only by quantitatively restricting the operation of "reason" do many see any chance for control by legal processes of conduct that society has decided to subject to public judgment.

Of course, one way out of the imbroglio lies in making the assumption that a single simple model applies to the reform of whatever the legal process has set out to reform: hospitals, prisons, rest homes, welfare departments, or whatever example might be culled from the vast array of institutions which legal process, particularly in the United States, has set out to reform. The orders can then be drafted in relation to a simple construct and applied in a complex world.

Will it work? Sometimes, but not often. And incredible energy is expended in relation to the model and very little at all in relation to reality. But problems become bureaucratized; careers get made; jobs are created; dissertations appear and degrees are awarded; and enormous satisfaction is expressed generally. Therein lies happiness for some, but therein is incubated the law's loss of credibility, the extinction of law's ability to persuade, the closing of the best conduit for regular change. And when that fails, the next step may be the old Roman legions' solution of decimation. But while that was a lawful act, it was not law.

VI.

Decimation, however, was an act of authority, the value of which the early Roman republicans knew. Do the democratic pluralist leaders of the late twentieth century hold authority in the same regard? Or are they like the late Roman republicans, the adherents of Sulla and Marius, so busy seizing power for faction that authority slipped away into the hands of Caesar? Of course, all modern leaders recognize that authority is a necessity. Somewhere the location of the source of decisions has to be determinable to be respected, to be sufficiently acknowledged by all, to be identified as the effective authoritative voice. Every public man purports to know this much. But *culturally* do we as a people in the United States, as one example, accept any longer the necessity of authority?

It is Iredell Jenkins' thesis that such an acceptance is waning. Authority, even more than among any medieval realists, is being treated as a kind of property that is a mere creature of the legal apparatus. But authority for him is a relationship. It is held by some, directed at others, asserted in the name of all in democratic societies, and aimed at definite purposes for the accomplishment of some social good. So secure has the American system been, that Americans take authority's existence for granted. Authority becomes the

perquisite to office, a rather minor thing. Americans do not focus at all upon the other aspects of authority. Hence they are quite free to treat what appears to be such a trivial matter as subject to an easy reallocation. But for Jenkins this is a cavalier attitude inevitably leading to grave consequences.

It is very easy to identify authority with our vaunted government of laws rather than of men, the heritage of the federal constitution of 1787. But authority is late-coming in legal history, and its arrival is not yet universal in all cultures. Authority existed first in leadership, still inheres in leadership, and is only partially transferable to impersonal legal systems. It is rooted in the esteem in which its exercise is held. For authority, nothing succeeds like success; hence, the miserable lack of authority in a talk-shop like the United Nations and its deliquescent international bureaucracy, characterized by Golda Meir as "an umbrella to be taken in at the first drop of rain."

Increasingly, authority has moved away from the anointed kind, says Jenkins, to the impersonal, formal, artificial, rationalizing authority of bureaucratic leadership. The power of the institution initially confers the chance for authority. This nonpersonal type of authority suits the larger, complex, often intraconfrontational groupings increasingly typical since the inception of the Industrial Revolution. Within these institutions, power is dispersed. Its loci often proliferate. For example, in the United States efforts have been made within the past decade to bring all affected constituency groups within the decision-making process of the authoritative institutions in the name of participatory (as contrasted with representative) democracy. Where Iredell Jenkins finds the inherent risk in all of this is in authority's need to be part of a supremacy myth in order to have its regularly expectable successes. Practices encouraging participation are undermining the myth, hence, destroying the chances for even intermittent success.

Whether or not a legal system has validity, says Jenkins, is whether or not it operates with efficacy. The law's relation to authority compels law to share this common requirement. Law, however, is the means whereby the leaders who assert authority can be limited in what they may order for social action, simultaneously preserving the private sector from the public and assuring individual rights against an overweening social obligation.

Through law, people create the roles they play as governors and governed with a scripted organization of power limitations on both sides. But the governed cannot confer authority on the governor by a simple election to office. Americans have thought this possible over a long period of time. We have enjoyed a culture that provides stability for established power allocations. Yet while stability can be "good," it can also be "bad." Stability can contribute to the impaction of society in such a way that our society is deprived of fresh, new leadership and, hence, may have lost its chance for revitalization. A similar condition accounted for Adolf Hitler's making chopped chicken liver out of so many western European democratic leaders in so few a number of years. The efficacy of authority and law alike had gone,

and nothing was left to protect masses of humanity from the vagaries of one rampant leader.

Too often, particularly in the United States of late, says Jenkins, we assume a formal legal validity leads to real efficacy. But the assumption is increasingly breaking down in practice. Law has no monopoly of wisdom. Remember that the man whom Henry VIII said was for *all* seasons became Saint Thomas More by failing to be the man for *one* season of superordinate importance to his sovereign. And the sovereignty of the law itself could be swept away by a similarly significant failure.

VII.

For Jenkins, the obligation to obey the law is ultimately a kerygma. If a man asserts that he has no obligation to obey any law of any state, trying to convince him that he really does is like trying to prove to a member of the Flat Earth Society the world is round. Reason, logic, and the marshalling of evidence have roles to play in advocacy, but to the obdurately opposed, argument leads to nothing. People must generally accept that there is a sufficient benefit from believing in legal obligation in order for each to accept the need for such obligation, or people cannot be independently convinced. For this reason, the freeloader has to be always an appealing popular figure, far more so than Robin Hood, who only stole from the rich to give to the poor. But the ruthless shark who freeloader cruises through the waters of society, ripping off such passing poor fish as he chooses, without regard for any limitation other than appetite.

Most people, however, realize either that they cannot be sharks or that they lack the capacity to be very successful ones. This majority finds an advantage in society, in legal obligations imposed by the authority and law of that society, and in the values stemming from social interrelationships that oblige others to provide support. The idea of mutual support is certainly rational, but on any individual basis not provable against the assertion that, "legal obligation is not for me." But Jenkins sees the lived relationships that tie parent to child, spouse to spouse, lover to lover—just to consider the affective relations, assuming familial relations are affective ones—as the source of the belief in legal obligation on a wide scale in society. Neither coercion nor argumentation drives people into a belief in legal obligation, says Jenkins. Rather, it is the lived relationships of all kinds that do so.

Concomitantly, when lived relationships break up, or become purely exploitative of one side by the other, or people withdraw as singletons from as many relationships as they can, Jenkins can only see legal obligation as subject to an inevitable, not long delayed dissolution. It is a dissolution that will be accelerated by assigning to law many of the functions previously performed by the more and more rapidly collapsing nonlegal relationships. If family life is nothing more than wife beating and child abuse, if the ideal of home life is living alone with no interests except watching television and

eating chip dip, if a job is to be held only long enough to qualify for unemployment compensation, or if an employer's duty is only to fire the faithful employee just before qualification for pension, then legal obligation cannot take up the slack in a slackening system and will itself soon be lost. And neither coercion nor cajolery can bring legal obligation back once this has happened. Every man might then make his own morality, but it would be of precious little value to anyone, including its maker.

So what is happening in the United States in the 1980s? According to Iredell Jenkins, one certainty is the overloading of the law beyond what legal obligation can bear. The vice, as noted above, is an old American one in practice, but the first modern principled justification for it he associates with the "law as engineering" metaphor of Roscoe Pound.

For Jenkins, Pound was misled by his milieu when he propounded his initial views in the 1920s. By the 1950s, Pound was finding the use of law as a tool for social engineering not so simple a technology as he had thought. But by then, Pound had served his purpose as Sorcerer's Apprentice and his besom was sweeping like a steel broom.

Pound's view rests upon three faiths: faith in universal success for science and technology, faith in the omnicompetence of law, and faith in reform *qua* reform. None have proven justified. The users of law for social engineering have found themselves as often defeated by the definition of the problem allegedly requiring solution or by the selection of the remedy sought for the problem as by opposition to using law for this purpose.

Law *has* been used for social engineering purposes. Reformers have insisted upon the attainment of lofty goals. Scientists have laid out the means for supposedly attaining any goal sought. The images, too, have been lofty ones: "Reach for the stars." "If we put a man on the moon, we can do ____ [blank to be filled in by any choice of the speaker]." And then these estimable people come to the legal apparatus, modestly requesting, "All you have to do is what is needed to make every one of our schemes a success."

No one can deny that the law has tried. Yet Jenkins finds it more than serendipitous that the metaphor of "law as engineering" has given way to the metaphor of "war on ____ [evil purpose blocking lofty goal once more to be filled in by choice of speaker]." When war becomes the metaphor, ultimately the talk about law and the utility of the legal apparatus will start to be muted, because the belief in the omnicompetence of law will have given way to a belief in the omnicompetence of a far more direct means of reordering priorities.

VIII.

The course of law in the late twentieth century United States has been one of increasing rhetoric concerning "rights." The rhetoric is thoroughly understandable. Since Arnold of Brescia in twelfth century Rome cast popular political demands in terms of "rights," hurling them in the face of a Papal and Imperial hierarchy that rested upon a Divine Inequality, politicians and

reformers, the nearly altruistic and the thoroughly selfish, have called their demands "rights." If successful, the plea for equality undermines its opposition and limits the power of government: if unsuccessful, the failed effort to produce equality leaves a residuum of justification that serves as base for a later effort.

Of course, a great many of the "rights" spoken about today are creatures of legal procedure, not manifestations of a metaphysical order even in the minds of their proponents. For example, if the government wishes to give something away, this procedural type of "right" requires the government to establish a process for determining the condition of the donation, who the donees may be, and how the donation is to be passed out to them. But the "rights" for which governments are overthrown, and men, women, and children slain, are of the more eternal variety—or, at any rate, some sort of overarching claim is made on their behalf by those inciting civil disobedience, civil tumult, revolution, or whatever righteous public action is being undertaken.

Legal "rights" rest, at least historically, upon long accepted natural "rights." Most of those in academic circles today look askance at either calling anything moral or saying it has a natural origin. The modern intellectual likes ethics to be situational, morals to be instrumental, accountability to be relative, and sin to be nonexistent. Many of those who have been legally trained cast all their ideas in these terms, thereby, making all legal action a matter of procedural reform. But, then, thinking like a lawyer is often an excuse for not having to think at all.

Yet these same people have had little trouble in talking about human "rights," even praising an international declaration concerning said "rights" and exalting many asserted "rights" as superior to all sorts of assertedly inferior kinds of relationships. Iredell Jenkins compares these people to that famous little girl, Virginia, who wrote to the editor of the New York *Sun*, begging him to tell her that there really was a Santa Claus. In the absence of an answer from the editor, no one is around to tell them how the expansion of "rights" is not to go on to infinity, or if there are "rights" more basic than others, or when a respectably asserted "right" shades off into, horrors, *Privilege*.

The traditional human "rights," Iredell Jenkins tells us, were negative in operation: Government shall not interfere with speech, assembly, security against unrestrained search and seizure, and so forth. But today, "rights" are positive: Government shall do a host of "good" things, so that "right" becomes equated with whatever society currently considers a social or individual "good."

The old "rights" were cheap to supply; the new "rights" are costly beyond the power to calculate them. Because this change is a social phenomenon with massively popular support, all divisions and branches of democratic pluralist government espouse the proliferation of such positively good "rights." The old traditional negative "rights" become trivialized in the pub-

lic mind, simultaneously associated with pornography as an expression of free speech while those convicted of horrendous crimes are set free because somebody made a slight mistake in the manner of the arrest. But no one is prepared to find anything trivial in any sort of governmental subvention, described today as "entitlements," ranging from the Chrysler Corporation to the least deserving poor.

For Iredell Jenkins, the famous dictum of Karl Marx is of crucial importance in pointing out the flaw in this kind of thinking about human "rights." Marx said, "From each according to his ability, to each according to his needs." The new view of human "rights" loves the latter part of the aphorism: who has not needs for "rights" to satisfy? But the first part? Well, no, thank you. That smacks of authoritarianism, compulsion, Gulag, and other Marxist externalities. And Iredell Jenkins would say, "Absolutely correct!"

When the positive human "rights" are without limit, growing in accordance with whatever is called "good" by society, the only way society can cover the cost of providing all this is on credit. And credit ultimately means either payment or bankruptcy with a working out of the bankruptcy. And then, indeed, the time will come to extract from each according to his ability, plus a good deal more. When that happens, the constitutional order will be fortunate to salvage a few of the old traditional, negative, cheaply provided "rights."

But even if modern society could eke out its credit arrangements, clinging to the human "rights" so expensively financed, the situation must require taking from the ability of *some* if the needs of *all* are to be met as "rights." To Iredell Jenkins, even that forebodes a hard history in the future for a great many democratic pluralist governments. Perhaps we cannot be compelled to be free, but we can certainly be compelled to serve society for the good of all and for the less good of our individual selves. Indeed, is that not implicit among the pleas for the positive human "rights"? Iredell Jenkins believes so.

It is his thesis that what is "good," however determined, is not turned by that social fact into a "right." "Goods" can be advanced and sought, acquired, distributed, and made to confer all the benefit of which each "good" is capable. In so doing, it is necessary to keep in mind that almost every "good" will have secondary effects that most in society will call a "bad." When Governor Wallace walked to his office window and said, "Smell all that money," as he breathed in the smoke from some nearby factory, he was exemplifying the fact that primary "goods" come with secondary "bads." Nor are all "bads" as easily coped with as pollution controls on stationary emission sources. But when people are talking about getting something "good," it is likely to be far easier to get them to recognize the secondary "bad" than when they have fought for and obtained something called a "right." For most, *can* a "right" really produce a "bad"?

The tendency, furthermore, must be for the activists pushing for the attainment of "rights" to bypass law. To argue for a "good" is something to be done within a system of established order. But to have pushed for some-

thing called a "right," only to have its attainment blocked, calls for the radical alteration of the established system.

Throughout the decades since World War II, the source of much significant change in the United States has been in the federal judiciary. Iredell Jenkins finds not a penny's worth of difference between the Warren and Burger courts in this regard up to this point in time. But the time has come, he believes, for there to be a slackening in the judicial response to those who demand more and more as a "right" to be assured, for instance, under that accordian called the fourteenth amendment.

Still, when these demands for "rights" meet an insufficient response from the federal judiciary, a time of trouble will ensue. The first recourse will be to turn to the rest of the political process. But, then, if recourse had been as easily available there, would the judiciary have been so sought? Most unlikely, unless one really believes in democracy.

But even if one does believe in democracy, as does Iredell Jenkins, the response seems slower from the rest of the system than from the judiciary. More constituencies get involved in a legislature. The costs, and how to meet them, *have* to be considered by legislators. Perhaps what ultimately emerges in a statute may not take any more time to reach its final state than what emerges finally after all the public recriminations and resistances to court ordered "rights." But time spent in the legislative process seems longer, because unlike in the courts, no authority has pre-cast the argument as one implementing a "right." In the legislative process, anything can be asserted as a "right," but until a statute is signed into law, nothing is enforceable. And a mere statute, as compared to something enshrined in the Constitution (however recently found there in some sort of product of the United States Supreme Court), lacks the cachet for Americans who want to argue in terms of a "right."

No, says Iredell Jenkins, once the public has tasted the strong meat of "rights," it will not easily accept the blander taste of "goods." A medieval nobleman, accustomed to being fed on mast-fed pigs whose meat was allowed to ripen to high tenderness after slaughter, would feel culinary deprivation on the finest scientifically produced modern chop. Fortunately no time machine will ever test this. But society today, in Jenkins' view, is in the process of forming insatiable, unaffordable appetites. When provender for appetites seeking "rights" cannot be provided, then those appetites may consume the very processes previously seen as institutional means to their satisfaction. For Iredell Jenkins, the confusion of "goods" with "rights" has not produced a situation congenial to long-continued survival of the law.

IX.

Still, for Iredell Jenkins with his commitment to natural law, the collapse of any legal system is a natural phenomenon. All institutions seek to expand their power until they exceed their functions and, by overextension, thrust themselves into disrepute. Legal process in the United States is being over-

extended by its adherents in a way very reminiscent of what the Church did prior to the Reformation. The consequence is that law, like the ecclesiastical institution in the High Middle Ages, is pushing its standards, its procedures, its authority into every part of the social order.

Of course this intrusion produces resentment and resistance in the invaded institutions. That reaction is serious enough to merit consideration. Even greater consideration is called for when the other institutions abdicate to the legal intruder instead of resisting it and assume the role of aggrieved but helpless victim. But whether there is resistance or abdication, there is too often an overextension of law. Furthermore, the pressure is not to lessen this expansion but to cause the expansion to mount in intensity.

Professor Jenkins believes that this increase is inevitable, until some different view of man becomes socially acceptable. Is man a weak and wayward creature? If so, then he needs the support and constraint of a powerful church to keep him from slipping into sin and from collapsing into self-destruction. Is man independent and self-sufficient? If so, he is a kind of finite god, a hero who will not tolerate institutions that trammel his initiative. Is man only a hapless victim, lacking even enough responsibility to be weak and wayward? In that event, he needs all the care that a loving bureaucratic state can lavish upon him.

In all three theories of man's character, the law must take a markedly different stance. In the first, the law supports a naturally ordained inequality for guardian and ward. In the second, the law acts to prevent any barriers to the fulfillment of each rational ego. In the third, the law provides the structure for protecting the victim and doing everything possible to redress the infinite series of wrongs perpetrated upon man from before the moment of his birth until after he is interred. And for Professor Jenkins there is a certain circular movement here as to "rights," for he sees the "victim" as not much different from the "ward" and no more entitled to any "right" apart from support. In its ideal form, after all, medieval society purported to offer as much.

He does not urge any return to some past ideal of man as rational egoist. But neither does he believe that human ideals and ideologies are bound to the present forms of legal action, nor to the present theory of what man is. Justice, which is an ideal apart from law, is intimately a part of whatever change will occur. Society seeks to go through law to an ideal of justice. Justice, like other ideals, has a habit of falling apart under the pressure of the antinomies within it. Justice is always caught between the inutility of empty formulae and of cruel partisan acts taken in its name. In both cases, justice is lost one way or the other. There is no quantitative measure for justice, however much late twentieth century social science may seek it. Instead, there are ideals that Jenkins sees as alerting us far more effectively to the need to change public and private actions than any sort of quantitative measure.

The saint who leaped into the arena before the Emperor Honorius in order to stop the games in a Christian Rome was torn to pieces before a cheering Christian mob. But the Emperor stopped the games forevermore and a profound change in morality resulted. A poll of the ancient Christian

Romans would have accomplished none of this. The horror of the Roman games was immeasurable. Trying to take the measure would have been only a vicious pandering and not a moral solution.

But changes in society of this sort are rare, if often less dramatic. The reason lies in law's relationship to the ideal of justice, since in that ideal will be found the faults correlative with the society's virtue. On this point, Jenkins gives the example of Alexander Solzhenitsyn's puzzlement over the American obsession with human rights and civil liberties, while at the same time Americans tolerate public disorder and idleness. On the other hand, Americans have expressed a similar puzzlement over the fear of social disruption that even a Solzhenitsyn feels, a fear he feels to the point of demanding limits on social tolerance. Changing the basic social views as set forth here seems almost an impossibility, whatever revolutions occur.

American law advocates, however, need not take great comfort in this kind of stability. Justice is not law; law is not society. Justice can be sought by ways other than through legal process. Society can be operated by other than legal processes. Law and its adherents must be modest. For Iredell Jenkins, positive law is only a supplement to social order, and law is only a sufficient but not a necessary cause of order. Law works best when it is employed to assert social unity. This can be achieved most efficaciously when each event occurs gradually and even hesitantly. But the pressure cooker of the late twentieth century has had the steam turned up; no one can wait for the meal to be prepared before he demands to eat the food; and law is not a comestible when taken raw.

In a country as historically stable as the United States has been for so long, too many forget the extent of social services provided in the past by other institutions. They have come to actions apparently believing that if law does not do the job, there will be no recourse elsewhere. Rather than accept this as an inevitability, they need to inquire whether or not this is true. And if true, the question that must be asked is to what extent these other institutions have a renewing vitality.

Even conservatives today often see the economy as a creature of the state, to be hindered or helped by what the state does; and, therefore, these conservatives place the state and its legal system at the center of their attention. And what is true for conservatives has been even more true for the professedly liberal, who see a social vacuum outside the scope of American legal action. Iredell Jenkins agrees that in a complicated urban-industrial society the legal system does loom large, that there are vacuums where nothing exists if the legal system does not fill them. But he parts company when it is asserted that this expansion strengthens law and represents an occurrence always without alternative.

X.

The law's advocates seek only to secure the goals of substantive justice with all of their pressing expansions of legal activity. What they do not perceive is that traditional nonlaw subjects, drawn into legal procedure, that are

better not located there, have their characteristics changed by such action, rarely for their betterment. The world becomes a common pleas court. Formal tribunals for settling adversarial claims in a forum agreed upon by the parties have high social value. Still, these processes do impose stiff transaction costs no matter how well they may work. When this organization is applied to preferably nonlaw situations, not only are the transaction costs far higher, but the work undertaken is done neither efficiently nor to the satisfaction of many. It is extremely doubtful whether even the most activist advocates of broad judicialization would really enjoy living in a totally legalistic society. And if they would, they would not be joined by many with the same happy view.

Iredell Jenkins finds in the judicialization of the bulk of social action a damaging kind of formalism. Values need to be passed from generation to generation with a fierce sense of their rightness. The lawyering attitude is the reverse of this need: lawyers may argue fiercely for either side, but the point is that they can exercise their fierceness upon any side requested. It is not that lawyers find justice in the hands of whoever pays the fee—many public interest lawyers are not vulnerable to that charge—but that the artificiality of the legal process makes every social value of too relative a worth to be calculable in its own terms.

Bonds hold society together whose defenders would find it hard to withstand cross-examination in the neat confines of a courtroom. Such bonds as loyalty, patriotism, mutual trust, and the sense of benefit from the social whole are hard to sustain in such a way that each member of society feels routinely the obligation to support them. When the law's advocates put their legal artifices to work upon such values, they are never the same again, insofar as they are by then values that will have lost their collagenic powers.

The law now has become so significant that every special group is compelled to seek to control its formation and use. Only the eschatological sects, the apathetic, and those who firmly believe the law must look after them as victims can ignore who controls the legal apparatus. Increasingly, these special groups look upon courts the way the farmers' sector of the Polish union "Solidarity" looked upon the decision of the Polish Supreme Court to designate them a cooperative rather than a union. Their demand: "Don't say anything except yes to what we want." American jurists claim that Marxist judges deserve such treatment, but there are those who would say that the Warren-Burger Court deserves no better. The initial problem lies in having always to say yes, yes, yes. The eventual problem will lie in the loss of the significance of law in this sibilant sea.

Increasingly, people look to what advantage they can find in asserting that they are part of a group entitled to favorable treatment from the state, society, or some major part of the population not part of their group. By claiming to be in a party, a class, or an ethnic group, people have largely lost any interest in asserting their importance as individuals. Oh yes, as individual victims of society they have a "right" to all sorts of good things, but when the

time comes to use muscle, it is not individual muscle that is expected to matter. It is the strength of the group. Nor is the group expected to be the nation or the whole of society. The benefited parts are far less than the whole, and each wants it precisely that way for purposes of maximum exploitation of the whole for its most enterprising parts. The result means that each person sees the law simply as a means of coercion and not as a means of persuasion, as a device for group aggrandizement and not for social cohesion. And in the short run, these views have had more success than they have had failure.

But law as an institution must exist in the long, as well as in the short, run. The sovereignty and the authority are there, but limitations pertain to them that can be beaten down only at grave risk. One must never forget that force stands back of all social actions. It is widely regarded as no paradox that law ought to be the sole repository of social violence. When private morality decrees its "right" to override the law, this monopoly of violence is lost and the dragon's teeth are sown. Nor can the monopoly be best asserted when law is declared to be omniscient. The law cannot perform all social functions. To try is only to become the silly boss who cannot delegate, who claims to be able to do all the jobs, and who swiftly loses a managerial grip on everything, as in a Jacques Tati comedy.

For Iredell Jenkins, law is a second-order institution, but, withal that, a natural phenomenon. Though full of artifice, law itself is not artificial, being man-made only to the degree of its procedure. Law is not only this procedure, so that when people speak of improving the law—meaning improving its procedure—they improve only its man-made portion. Continuously, improvements have occurred in the law, allowing it to work to better purposes than previous generations of lawyers thought possible. But these improvements can never make law omniscient for all social purposes, however much their successes may blind men to that fact.

At its best, the law structures and protects the actions and actors respectively in society. The law ought not to be expected to take away all their roles from them. What value would lie in a play that had no audience, no actors, no playwright, no scenery, but only a stage manager insisting that he had subsumed all of them? Certainly it would not be a play to which anyone could buy a ticket, even should he want to.

Ironically, the virtue probably least honored in the late twentieth century, for individuals or for institutions, is modesty. Flacks can tout any alleged attribute except that one. Even to claim the value of modesty is to be eccentric to the point of being ignored. And yet this is precisely what Iredell Jenkins claims the law and its advocates must do, if law is to remain the final arbiter. Law already has lost that status, or else never had it, in much of the world. But he believes that even democratic pluralist polities may come to the point of wanting to do without law, or of thinking that they do. But should thought lead to action and law be jettisoned, rediscovering and reinventing it would come damnably hard. And Jenkins believes it would be shameful to have to reinvent this particular wheel.

XI.

This, in short, is a book of the times, for the times, and yet seeking a reach beyond the times. Traditional to a degree not common in this century, the views of this author look forward in one of those long avenues of perspective so beloved of classic writers before Christianity shortened the vista by inserting eternity. The past is important, but the future is more so. And yet, unlike the fascination with the future so beloved by our present, the fix of attention here is upon our present, that present encompassed by the book which stretches forward from 1960 toward the magic year 2000.

The author expresses deep gratitude to Sanford Levinson of the Department of Politics of Princeton University. Surely that is not because they hold many views in common. Rather it seems to have been the result of deep sustained criticism of Jenkins' arguments by Levinson and to his calling Jenkins' attention to authors whom Jenkins had neglected, even authors in broad agreement on many points of argument with Jenkins. The generous acknowledgement Jenkins makes for this could only have been matched by the generosity with which the criticism was offered.

Furthermore, the reader must be warned that this is not a book easily or swiftly read. Sanford Levinson may have been the first reader to interact with this manuscript, but every reader will have to do something very similar to Levinson's effort, and mine. My own copy is heavily interlineated. Nor could this review have been written without the copious marginalia that blossomed round the edge of nearly every page. (Libraries should be warned. Perhaps, as in medieval church book presses, the copies should be chained to the charge desk and users watched closely.) It is not a book to be treated with a ho-hum of either graceful affability or polite disdain.

Some, perhaps including the author of the book, will be unhappy because this review does not include the reviewer's reaction to the numerous legal illustrations scattered throughout the work, showing how the Jenkins' analysis would function. The most arduous of current American legal imbroglios were selected for this purpose. Federal-state relations, the proper location of the legislative function between courts and legislatures, the role of the federal judiciary as both a constitutional convention and an upper house of the Congress, and the paradoxes in affirmative action are among those selected. The illustrations are interestingly and provocatively employed. Certainly their complexities could each prompt a review of nearly this length. But this reviewer chose to dwell upon the overview of Iredell Jenkins. If it seems to another to be a fault, let us hope that someone of the stature of Ronald Dworkin or Roberto Unger—who are among those vigorously rejected and elliptically praised by Iredell Jenkins—will undertake the task.

To many it may seem strange that a reader would recommend a book over whose reading he struggled for nearly three months and who had to take nearly as long to summarize what he had learned in that struggle. But then this review has singularly failed to reflect the many marginal notations remarking

upon the beauty of the imagery. The book is like a Platonic trove of metaphor, allegory, simile, myth and poesy. The temptation was great to simply string together a series of quotations. The temptation was suppressed only because they had been created to illuminate the argument. To have emphasized the author's style of language would have been as scamping of his line of argument as to have expounded solely upon his illustrations from American law. Both impulses were hard to put down, and both impulses could have been allowed free rein without failing to produce a review weighted with significance.

Still, just as Iredell Jenkins could only write the book he did—and this reviewer would have had him write no other—so did this review find its emphases as the book was read, examined, and interpreted. Is the book without flaws? No, but the arguments are pregnant within it to meet accusations of flawedness. Could the author have done better within his own terms? Yes, he could have included more about the nonlegal institutions sustaining the social order, why they are under attack, why they are abdicating or are being abandoned by defenders, and what each might do to become defensible again. I think he could have done so, but the book would have been longer, and he chose to stress instead both the arrogations of law and its limits. Certainly writing the book as it stands took long enough. Taking in all this suggested territory might have prevented it from ever appearing.

The only advice this reviewer can give a prospective reader is to say: Read it for yourself. Struggle with it and enjoy its beauty, the way Hercules enjoyed the beauties of the Nemean lion. Find its weak points; think about how to correct them; think even about rejecting all the arguments of this volume *in toto*. And then think about what the better arguments are that are so preferred by you. But remember that you are rejecting arguments that are ancient, tenacious, and that have never as yet surrendered.

Have they been beaten down? Oh, yes, philosophers die just as easily as other human beings. But surrender? Ah well, that is another term altogether.

